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No. 16

IN THE

Supreme Court of the United States

October Term, 1957.

ANDREW G. NELSON, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, *Et Al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.

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OPINIONS BELOW.

The opinion of the Interstate Commerce Commission is reported at 63 M.C.C. 407.

The memorandum opinion of the United States District Court for the Northern District of Illinois is reported at 150 F. Supp. 181. Judge Perry's dissenting memorandum opinion is reported at 150 F. Supp. 186.

JURISDICTION.

This is an appeal from the judgment of a district court of three judges dismissing appellant's suit for an injunction against a cease and desist order of the Interstate Commerce Commission, brought under Sections 1336 and 2325 of Title 28 of the United States Code (28 U.S.C. 1952 ed., Secs. 1336 and 2325).

The judgment was entered on June 13, 1956; notice of appeal was filed on July 2, 1956; the case was docketed and the record was filed in this Court on August 31, 1956; and this Court noted probable jurisdiction on November 13, 1956.

Jurisdiction is conferred upon this Court by Section 1253 of Title 28 of the United States Code (28 U.S.C. 1952 ed., Sec. 1253).

STATUTES INVOLVED.

Motor Carrier Act, 1935 (Act of August 9, 1935, c. 498, 49 Stat. 543):[1]

> Sec. 209. (a) [as amended by Act of June 29, 1938, c. 811, Sec. 9, 52 Stat. 1238] Except as otherwise provided in this section and in section 210(a), no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: *Provided*, That, subject to section 210, if any such carrier or a predecessor in interest was in *bona fide* operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * except * * * as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be

[1] Now cited as part II of the Interstate Commerce Act. Act of September 18, 1940, c. 722, Sec. 15, 54 Stat. 919.

considered in connection with the issuance of such permit. (49 U.S.C. 1952 ed., Sec. 309.)

(b) [as amended by Act of June 29, 1938, c. 811, Sec. 11, 52 Stat. 1238] * * * The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 204(a)(2) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or add to his or its equipment and facilities, within the scope of the permit, as the development of the business and the demands of the public may require.

Sec. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein and shall remain in effect until suspended or terminated as hereinprovided. Any such certificate, permit, or license may * * * upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license * * *.

Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 237):

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS

* * * * *

All decisions * * * shall become part of the record and include a statement of (1) findings and conclusions,

as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *. (5 U.S.C. 1952 ed., Sec. 1007.)

Sec. 10. * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (5 U.S.C. 1952 ed., Sec. 1008.)

QUESTIONS PRESENTED.

I. Whether or not the Commission has the power retroactively to amend a grandfather contract carrier's permit under the guise of interpretation; contrary to Section 212 (a) of part II of the Interstate Commerce Act, (1) by substituting a description of authorized commodities by reference to their use for a description of authorized commodities by reference to places where they are sold and (2) by permitting the transportation of such commodities only when earmarked for such use.

II. Whether or not the Commission has the power to interpret a grandfather permit in such a manner as to render the authorized operations less broad in scope than the business carried on by the carrier during the grandfather period, in view of the guaranty of substantial parity of operations in Section 209 (a) of part II of the Interstate Commerce Act.

III. Whether or not the Commission's cease and desist order is unlawful under the Administrative Procedure Act for lack of findings and conclusions regarding all material issues, as required by Section 8 (b), and because it is arbitrary, capricious, etc., in violation of Section 10 (e).

STATEMENT.

On March 13, 1942, the Interstate Commerce Commission issued to Andrew G. Nelson, doing business as Nelson Warehouse & Express Company, a motor contract carrier permit to transport, within a ten state area, the following commodities (I.C.C. Ex. 7[2] R. 215, 232-233):

> *New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores * * *.

In 1951, Nelson incorporated his business under the name Andrew G. Nelson, Inc. (R. 72-73, 169), and on June 18, 1951, the Commission issued a new permit to the corporation (appellant), embracing the same operating rights as the old permit (I.C.C. Ex. 3[2] R. 38, 274).

On January 21, 1954, the Commission initiated a proceeding entitled *Andrew G. Nelson, Inc.—Investigation of Operations* by issuing an order which (1) recited the commodity authorization of appellant's permit, (2) stated:

[2] Exhibits for both parties were introduced and identified, serially, by numerals at the District Court hearing as well as at the Interstate Commerce Commission hearing. To avoid confusion, references to exhibits will be made according to the proceeding in which they were introduced.

It further appearing, That said Andrew G. Nelson, Inc., has been and is transporting as a contract carrier by motor vehicle in interstate commerce between points and places in the above-described area various commodities not within the scope of the commodity description,

(3) listed the commodities allegedly hauled in violation of the permit, and (4) ordered an investigation under Sections 204 (c) and 212 (a) of part II of the Interstate Commerce Act, in order to determine whether or not appellant was transporting commodities not within the scope of its operating authority, in violation of Section 209 (a) of the Act or of any restriction in appellant's permit. (D.C. Ex. 1; R. 38, 46.)

The matter was referred to one of the Commission's hearing examiners and a hearing was held at Chicago, Illinois, in May, 1954. (D.C. Fdg. No. 8; R. 280.) Various interested parties intervened to support the position of the Commission's Bureau of Inquiry and Compliance, none of whom have come to this Court. (D.C. Fdg. No. 9; R. 280-281.)

It was undisputed that appellant had, between July 31 and December 7, 1953, transported in interstate commerce for consignors (none of which was a drug store in the conventional sense) the following commodities to the following consignees (D.C. Fdg. No. 10; R. 281; I.C.C. Ex. 2; R. 65, 221-226; R. 55, 57-64):

Commodities	*Business of Consignees*
canned or packaged grocery items	grocery stores or warehouses
dry and liquid cream and fruit juices	food manufacturers
beer and wines	liquor distributors
dry glue	manufacturers of gummed products
candy	wholesale candy distributor
dry milk	dry milk distributor
malted milk powder, milk food, drugs and medicine	manufacturers of drugs and dietetic foods
automobile batteries	department stores
fibreboard boxes	dairy
kitchen, storage or wardrobe cabinets or lockers	not indicated in record

On the other hand, the Bureau raised no question but that these commodities constitute part of the stock in trade of drug stores,[3] but contended that such commodities could not be transported under appellant's authority to haul "*stock* in trade of drug stores" unless, when accepted for shipment, they either were already part of the stock in trade of a particular drug store or were earmarked or

[3] Albert Koehler, manager of Walgreen Drug Stores' inventory department and an employee for 31 years, testified that Walgreen carries all of the commodities allegedly hauled by appellant in violation of its permit as part of its regular stock in trade, that the nature of Walgreen's inventory had not changed much in the preceding ten to fifteen years, and that other drug stores carry essentially the same stock as Walgreen. (R. 118-121, 125, 132.) In the ten states covered by appellant's permit, Walgreen operates 234 drug stores. (R. 117-118.)

intended for use as stock in trade of a drug store.[4] (Examiner's report; R. 241-242.)

Nelson's permit had been issued under the so-called grandfather clause of Part II of the Interstate Commerce Act. (R. 277.) At the hearing, the Bureau took the position that the permit was ambiguous and, therefore, should be interpreted in the light of the grandfather operations which it was required to reflect. (R. 50-52.) As evidence of the nature of those operations the Bureau incorporated by reference the entire record of the Commission in the grandfather permit application proceeding (Docket No. MC-1194).[5] (R. 53.) On the other hand, appellant took

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[4] Before the hearing examiner, counsel for the Commission's Bureau of Inquiry and the Compliance stated the Commission's position as follows (R. 53):

> * * * it is our position that * * * there may be one or more items which come under new and used store fixtures but principally it is stock in trade of drug stores, so that the commodities named in the Order we claim are not authorized by the term stock in trade of drug stores unless they are when accepted by the carrier for shipment, earmarked or intended for use as stock in trade of a drugstore, and that those commodities are not authorized when they are transported for other individuals who distribute them through other sources than drug stores; in other words, it is the Commission's position that the intended use theory applies to this [e] case, in the construction of this authority.

[5] Although the entire record in the grandfather application proceeding was incorporated by reference, the Bureau introduced into evidence only selected documents from the record. (I.C.C. Ex. 1; R. 53, 215-220.) Later, appellant introduced several other documents from the record. (I.C.C. Exs. 5, 6, and 7; R. 215, 230, 232, 273. Although the document appearing at page 273 is part of District Court Exhibit 2, it is identical with Interstate Commerce Commission Exhibit 6, which has not been printed.) Before the District Court, certain documents which were part of the record in the grandfather case but which had not been introduced into evidence before the Commission, except by reference, were introduced into evidence. (D.C. Ex. 2; R. 38, 247-273.) For the Court's convenience, all of the documents from the Commission's record in the grandfather proceeding which are contained in the printed record before this Court, regardless of when and by whom they were introduced, are as follows, arranged in proper sequence:

> Application for grandfather permit, with attachments, dated December 30, 1935 (D.C. Ex. 2; R. 38, 247-262—note that because of a printing error pages 247 and 248 should be reversed);
>
> Nelson's Schedule of Minimum Rates and Charges, issued March 30, 1936 (D.C. Ex. 2; R. 38, 273);
>
> Sworn statement of Andrew G. Nelson, submitted in support of application, with attachments, dated November 11, 1936 (D.C. Ex. 2; R. 38, 263-272);
>
> Commission's compliance order, dated February 14, 1938 (I.C.C. Ex. 5; R. 215, 230-231);
>
> Grandfather permit, dated March 13, 1942 (I.C.C. Ex. 7; R. 215, 232).

the position that the permit was not ambiguous and that it should be interpreted without reference to evidence of the underlying grandfather operations. (R. 115-116.) Nevertheless, in order to give a more complete picture of Nelson's grandfather operations in case the permit was found to be ambiguous, appellant introduced into evidence Nelson's N.R.A. Certificate of Registration (I.C.C. Ex. 4; R. 215, 229) and the testimony of Andrew G. Nelson himself (R. 72-100, 133-166). The events preceding the issuance of Nelson's grandfather permit, as established by the evidence introduced by both parties, may be summarized as follows:

Andrew G. Nelson started in the warehouse and trucking business in Chicago, under the name Nelson Warehouse and Express Company, in 1919 and incorporated the interstate phase of his trucking business under the name Andrew G. Nelson, Inc., in 1951.[6] (R. 73, 77, 160, 248.)

In preparation for the hearing, Nelson compiled, from his memory and from the cash book he had kept since he started in business,[7] a list of some of the customers for whom he was transporting merchandise during and preceding 1935, when the Motor Carrier Act was passed. (R. 77, 158.) For convenience, we have reduced his testimony regarding these customers to tabular form and have drawn a comparison between the commodities hauled by Nelson during the grandfather period (prior to July 1, 1935) and the commodities allegedly hauled by appellant in violation of its permit between July 31 and December 7, 1953. (Appendix A, *infra*, p. 48) Nelson's testimony shows that, between the time he started in business in 1919 and 1935, Nelson was in the business of hauling anything, anywhere, for anybody, for any price. (Appendix A; R. 84, 96-98.) He lost some

[6] Subsequently, Nelson sold all of his stock in appellant, so that he had no financial or other interest in its operations at the time of the hearing, nor was he related to appellant's president, Harold E. Nelson. (R. 73.)

[7] Nelson's other books, delivery tickets, etc. had been given to the scrap drive during the war and were not available at the time of the hearing. (R. 77-78.)

of his customers during the early 1930's when they went out of business because of the depression, but there is nothing to indicate that, as of 1935, he was not still in the business of hauling anything, anywhere, for anybody who wanted his services. (Appendix A; R. 75, 79, 80, 148-152.) In fact, on August 24, 1934, he was granted a Certificate of Registration under the Code of Fair Competition for the Trucking Industry (established by the National Recovery Act) in which he was described as an "ANY-WHERE FOR HIRE Member of the Trucking Industry."[8] (I.C.C. Ex. 4; R. 215, 229.)

When the Motor Carrier Act was passed in 1935, Nelson went to the local office of the Commission's Bureau of Motor Carriers to see what he had to do to comply with the new law. (R. 75.) His case was handled, for the most part, by a Mr. Petritz, who was deceased at the time of the hearing. (R. 85-86.) Nelson did not know how to go about procuring a permit and was not represented by counsel, so he relied on Petritz, who guided him in the process. (R. 85, 92.) Eventually, Nelson was given forms to fill out in order to obtain a permit and he was told by Petritz how to file the application. (R. 87.)

On January 2, 1936, Nelson submitted his application for a permit to transport "store fixtures, miscellaneous merchandise and household furniture" in interstate commerce as a contract carrier by motor vehicle. (D.C. Ex. 2; R. 38, 248.) Exhibit A to the application was a questionnaire concerning the type of service rendered by and the routes and territory served by the applicant as of July 1, 1935. (R. 247, 249.) Nelson's answers to the various questions give the impression that, as of July 1, 1935, he had only one contract—with the Walgreen Company—to transport store fixtures, miscellaneous merchandise, and house-

[8] Under Section 209 (a) of part II of the Interstate Commerce Act, *supra*, p. 2, the fact of such registration "shall be evidence of bona fide operation to be considered in connection with the issuance of such [grandfather] permit."

hold goods of employees in connection with the opening, closing and remodeling of Walgreen stores within a 600 mile radius of Chicago. (Answers to Questions IB and III B-D; R. 247, 249.) As evidence in support of his answers, Nelson submitted with his application copies of his State of Indiana Public Service Commission permit (R. 254-258), his State of Wisconsin Public Service Commission license (R. 258-261), and an affidavit by Walgreen's traffic manager (R. 261-262), all of which confirm the impression that Nelson was hauling only for Walgreen.

Subsequent to the filing of the application, the Commission's inspectors investigated Nelson's operations—particularly his delivery tickets and bills of lading.[9] (R. 76-77.) Unfortunately, the report of their investigation is not a part of the record before this Court.[10]

On November 11, 1936, in the Bureau of Motor Carriers' Office, Petritz gave Nelson a statement to read and sign, in connection with his pending application. (R. 89-90, 153.) Like the application itself, the statement gives the impression that Nelson's only contract was to haul store fixtures, equipment and merchandise in connection with the opening, closing, or remodeling of Walgreen Drug Stores and to haul household goods for Walgreen's employees at Walgreen's expense. (D.C. Ex. 2; R. 38, 263-265.) This impression is confirmed by certain documents attached to the statement.

[9] The documents inspected were not available at the time of the hearing; they had been given to a scrap drive during the war. (R. 76-78.)

[10] As indicated above (note 5), the entire record in the grandfather proceeding was incorporated into evidence by reference at the hearing before the Commission. Then, at the hearing before the district court, appellant introduced into evidence what it believed to be the entire record in the grandfather proceeding prepared and certified by the Commission pursuant to an agreement that the entire record would be produced and placed in evidence. (D.C. Ex. 2; R. 38.) This exhibit contains no reference to a report of investigation. However, since this case was docketed in this Court, we have discovered that the Commission has a so-called "confidential" file with respect to Nelson's grandfather application, containing a report by Mr. Petritz, who made the investigation of Nelson's grandfather operations. Despite repeated requests, we have been denied the right to see that report and, therefore, do not know what light it might shed on the nature of Nelson's grandfather operations.

consisting of affidavits of Nelson's warehouse foreman and two of his drivers (R. 265-269), a list of 17 of Nelson's delivery tickets showing shipments for Walgreen in ten states (Statement, par. 9 (6); R. 265, 269-270) and a copy of Nelson's contract with Walgreen. (R. 270-272).

In contrast to the impression given by the application and statement in support thereof, Nelson testified that, about the middle of 1935, Walgreen was not his only interstate trucking account, but that he was hauling various commodities for other shippers, that less than one-half of his business involved the transportation of products to drug stores or drug warehouses, and that at the time of the application, he had delivery tickets to show it. (R. 93-94, 99-100, 133-134.) Nelson explained the apparent discrepancy between the documentary evidence and his testimony in the following manner:

Nelson had been serving Walgreen since 1919 and that was his "blue ribbon" account. (R. 92-93.) He was told by Petritz that, in order to get the kind of permit he wanted (i.e., a permit to haul store fixtures, household goods, and miscellaneous merchandise as a contract carrier) it was necessary to show only that he had *one* contract and that he had made *one* delivery in each state for which authority was requested; then, after he had received his permit, he could add other contracts with anybody so as to continue the kind of business he had been doing. (R. 90-91, 98, 153-154.) Accordingly, Nelson submitted his application and supporting statement showing only his Walgreen contract and only Walgreen delivery tickets because Petritz had advised him how to fill out the application and had actually prepared and told him to sign the supporting statement. (R. 87, 89-91, 133-134, 153.) Nelson signed because he knew nothing about the new law and was just trying "to get by the best I could". (R. 139-140.) Nelson even objected to paragraph 7 of the statement, to the effect that he was an interstate contract carrier only for Walgreen,

but he signed the statement because he was told by Petritz that that was the way to get the kind of permit he had applied for. (R. 89-91, 133-134, 153-154.) Likewise, paragraph 10 of the statement, to the effect that "his operations, except for frequency of service, have been the same for the past seventeen years" was not true, insofar as it implied that he had been hauling only for Walgreen; but he signed it anyhow. (R. 138-139.)

No hearing was held in connection with Nelson's grandfather application.[11] (Examiner's report; R. 244.) However, on February 14, 1938, the Commission issued what is commonly known as a compliance order, which read, in part, as follows (I.C.C. Ex. 5; R. 215, 230):

After due investigation:

> *It appearing*, that applicant in accordance with the requirements of Section 209, Motor Carrier Act, 1935, * * * made application for a permit to operate as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* * * * and that the said applicant * * * was in bona fide operation in such manner on July 1, 1935, and has so operated since that time; and the Commission so finding; therefore
>
> *It is ordered*, that upon full compliance with the requirements of Sections 215 and 218 of the said Act * * * a permit shall be issued * * * authorizing said applicant to engage in interstate or foreign commerce, as a contract carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order;

The appendix "on the reverse side" of the compliance order states (R. 231):

> The business of applicant * * * in interstate or foreign commerce as a contract carrier by motor vehicle

[11] This was not unusual; many uncontested grandfather applications were handled informally. *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 295 (note 3) (1948).

of the commodities indicated, over irregular routes, is as specified below:

New and used store fixtures, new and used household goods, and *stock* in trade of drug stores.

Between points and places in [10 Mid-western States].

It should be noted that, although the compliance order states that Nelson had applied for a permit "according to the specification" set forth in the appendix and that Nelson was in bona fide operation "in such manner" on and after July 1, 1935, the specification lists the commodities transported as "*New and used store fixtures, new and used household goods*, and *stock* in trade of drug stores", whereas Nelson's application was for a permit to transport "store fixtures, miscellaneous merchandise and household furniture." (D.C. Ex. 2; R. 38, 248.) In addition, the list of delivery tickets submitted with the application described the commodities hauled only by the following terms[12]. (D.C. Ex. 2; R. 38, 269-270):

Miscellaneous fixtures
Miscellaneous store fixtures
Miscellaneous fountain outfit
Miscellaneous equipment and stock
Miscellaneous merchandise
Miscellaneous household goods.

Nowhere in any of the documents before the Commission when the compliance order was issued was there any reference to the phrase "*stock* in trade of drug stores."

As noted above, the Commission finally issued Nelson's grandfather permit on March 13, 1942 (almost six years after the application was filed on January 2, 1936, and over

[12] See also Nelson's Schedule of Minimum Rates or Charges, issued March 30, 1936, and submitted in connection with his application, in which he quoted rates for the following commodities (D.C. Ex. 2; R. 38, 273):

Store Fixtures
Miscellaneous Merchandise
Household Goods and Furniture

four years after the compliance order was issued on February 14, 1938). The permit orders (I.C.C. Ex. 7; R. 215, 232):

> *** That the transportation service to be performed by [Nelson] *** shall be as specified below:
> *New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores, over irregular routes,
> Between points and places in [10 Mid-western States].

This, then, was the background of events that led up to the issuance of the grandfather permit whose interpretation was before the Commission in *Andrew G. Nelson, Inc.—Investigation of Operations.*

On September 22, 1954, the hearing examiner issued his report (1) setting forth the pertinent language of the permit, (2) listing the commodities transported by appellant which were alleged to be in excess of the authority granted by the permit, (3) pointing out that these items do constitute part of the stock in trade of a drug store, but (4) interpreting the "commodity description '*stock* in trade of drug stores'" as the equivalent of "*drugstore's* stock in trade" and (5) concluding that, under that interpretation, appellant could transport either commodities to drug stores only or commodities "which are earmarked for eventual delivery to and sale in a drugstore." (D.C. Fdg. 14; R. 282; D.C. Ex. 1; R. 38, 240,243-244.) Accordingly, the examiner found that appellant had engaged in operations not within the scope of its operating authority, in violation of Section 209 (a) of part II of the Interstate Commerce Act, and recommended the issuance of a so-called cease and desist order. (R. 246.) It should be noted that, in reaching his decision, the examiner held that the permit contained no patent ambiguity, so that (R. 242, 244):

> In considering the issue thus presented neither the operations of respondent prior to the "grandfather"

> date, nor the Commission's intentions with respect thereto in issuing the permit, are of any importance.

Nevertheless, he did bolster his conclusion by "an examination of the circumstances under which the permit was issued," referring only to the documentary evidence which was before him concerning the grandfather application and completely ignoring Nelson's testimony explaining the circumstances under which the application had been made. (R. 244.) It should also be noted that the examiner in no way attempted to interpret the commodity descriptions "*New and used store fixtures*" or "*new and used household goods*" to determine whether or not some of the commodities allegedly hauled in violation of the terms of appellant's permit might have been authorized by those descriptions;[13] rather, he stated (R. 242):

> The sole issue herein is thus explicit and requires a determination of the extent of the authority granted by the commodity description "*stock* in trade of drug stores."

Appellant filed exceptions to the examiner's report on October 29, 1954. (D.C. Fdg. No. 15; R. 282.). On March 17, 1955, the Commission, by division 5, filed its report adopting the examiner's report as its own, except as modified,[14] stating that, with respect to that portion of the permit primarily in issue, namely, the phrase "*stock* in trade of drug stores", it agreed with the examiner that

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[13] At the beginning of the hearing, the Bureau's counsel had stated that some of the items might have been properly transported under the new and used store fixtures category. (R. 53.)

[14] So far as we can see, the Commission's report modifies or supplements the examiner's in only three respects:

(1) the term "*New and used store fixtures*" is defined, but only by reference to two of the Commission's decisions and not with respect to the commodities whose transportation was in question in this case (R. 237-238);

(2) appellant's contention that some or all of the questioned commodities could be hauled as "*new and used household goods*" is rejected on the theory that any article which is part of the stock in trade of a mercantile establishment does not come within the meaning of "household goods", except as incident to the movement of such establishment from one location to another (R. 238); and

(3) the Commission, unlike the examiner, holds that the important question to be decided is what transportation was intended to be authorized by the language of the permit (R. 238).

> *** to the exten[t] respondent is transporting commodities which at the time of their movement are not, or are not intended to become, part of the stock in trade of a drugstore, such operations are in excess of its authority ***,

and directing the entry of an order "requiring respondent to cease and desist from the operations found to be unauthorized." (D.C. Ex. 1; R. 38, 234, 240.) In reaching its conclusion the the Commission held that the language of the permit was not ambiguous and, therefore, gave no consideration to events underlying its issuance. (R. 237.)

On March 17, 1955, division 5 of the Commission issued an order requiring appellant, on or before May 2, 1955,[15] to cease and desist from the operations found in the Commission's report to be unauthorized and unlawful. (Compl. Ex. E; R. 31-32.)

On December 12, 1955, appellant filed this action in the United States District Court for the Northern District of Illinois (Eastern Division) to obtain an injunction against the enforcement of the Commission's cease and desist order. (R. 1.) On March 7, 1956, a hearing was held before a district court composed of Circuit Court of Appeals Judge Finnegan and District Court Judges LaBuy and Perry. (R. 37.)

The evidence consisted of the Commission's record in the proceeding under review (D.C. Ex. 1; R. 38, 46-246), the Commission's record in the grandfather proceeding. (D.C. Ex. 2; R. 38, 247-273[16]), appellant's permit (D.C. Ex. 3; R. 38, 274), and evidence to show that the Commission's cease

[15] The effective date of the cease and desist order was voluntarily postponed, from time to time, by the Commission, so that it was finally set for August 1, 1956. The Commission refused voluntarily to postpone the effective date beyond August 1st, but on July 28, 1956, Mr. Justice Reed signed an order staying the operation of the cease and desist order pending this appeal.

[16] As indicated above (note 5), pages 247 and 248 of the printed record should be reversed. The Certificate of the Secretary of the Commission covering Exhibit 2 in the District Court (Folio 466) was designated for printing, but was omitted in printing without any reference to its existence. Hence, there is no clear indication in the printed record of where Exhibit 1 ends (R. 246) and Exhibit 2 begins (R. 247).

and desist order would cause appellant irreparable injury (D.C. Ex. 4; R. 40, 42-43, 275).

On June 13, 1956, Judges Finnegan and LaBuy entered a memorandum opinion, findings of fact, and conclusions of law, outlining the history of the controversy, summarizing the Commission's conclusions, and refusing to disturb the Commission's order on the theory that it had acted within its statutory power and that its findings were supported by substantial evidence. (R. 276.) Judge Perry filed a dissenting memorandum opinion in which he considered the evidence showing the events underlying the issuance of the grandfather permit and concluded that the Commission had exceeded its statutory power in attempting to limit, by retroactive interpretation, the scope of the operations authorized by the permit and guarantied to appellant under the grandfather clause of the Interstate Commerce Act. (R. 284.)

SUMMARY OF ARGUMENT.

In a contract carrier by motor vehicle permit issued in 1942, under the grandfather clause (Section 209 (a)) of Part II of the Interstate Commerce Act, appellant's predecessor was authorized to transport "*stock* in trade of drug stores." In 1955, under the guise of interpretation, the Commission held that appellant was authorized to transport "'*stock* in trade of drug stores" *only* when such items were already part of or were intended to become part of the stock in trade of a drug store. In arriving at this conclusion the Commission applied a pernicious interpretive device known as the intended use test—first enunciated in 1949.

Appellant contends that the phrase "*stock* in trade of drug stores", as used in its permit, is nothing more than a generic description of commodities authorized to be transported by reference to the places where they are sold. This technique of commodity description was well known when the grandfather permit was issued, and the Commission's own decisions, at the time, made it clear that such a description authorized the transportation of commodities within the described class regardless of consignor or consignee. In fact, because the scope of such commodity descriptions was so broad, the Commission developed the so-called *Keystone* restriction in order to restrict the class of shippers for which commodities of the described class could be transported and said that was the only type of restriction appropriate for such commodity description. The classic example of a generic commodity description limited by a *Keystone* restriction is: such merchandise as is dealt in by grocery stores for persons who operate grocery stores. However, no *Keystone* restriction appears in appellant's permit and, under the Commission's own decisions, none may be implied.

Somewhat similar to a description of commodities by reference to the places where they are sold, but to be carefully distinguished under the Commission's own decisions, is a description of commodities by reference to the kind of business in which they are used, e.g., contractors' supplies. Although the Commission had early developed the *Keystone* restriction to limit authorizations to haul commodities described by reference to places where they are sold, no comparable restriction was developed to limit authorizations to haul commodities described by reference to the kind of business in which they are used. As a result, the Commission was later embarrassed to find that there were outstanding many extremely broad commodity authorizations—far broader than the expanding concept of the Commission's regulatory function could tolerate. In order to pare down these broad commodity authorizations the Commission developed the so-called intended use test as a restrictive interpretive device. In 1949, the Commission construed a certificate which authorized the transportation of materials, supplies and equipment *incidental to and used in* petroleum industry operations to mean that such commodities could be transported only when earmarked for such use. Building upon this decision the Commission applied the same restriction to such generic commodity descriptions, by reference to place of use, as packing house supplies, building materials, contractors' equipment, etc. The Commission was successful in restricting the transportation of such commodities to situations where they were actually earmarked for such use largely, we believe, because the carriers involved were all trying to read their commodity authorizations too broadly by ignoring the description of supplies, materials, or equipment by reference to the kind of business in which they are used. In any event, the Commission accomplished by interpretation and implication what it had failed to accomplish by express limitation when the authorizations were originally granted, viz., the imposition of the correlative equivalent of a *Key-*

stone restriction on generic commodity descriptions by reference to use; the consignees for whom such generically described commodities could be hauled was effectively limited to the ultimate user or to a clear conduit to the ultimate user.

The intended use test has never before been applied to a generic commodity description by reference to place of sale; in fact, both the Commission and a district court have refused to so apply it. The Commission's attempt to apply it now to appellant's permit constitutes (1) a misapplication of an interpretive device designed for commodity descriptions by reference to place or business of *use*, not for commodity descriptions by reference to place or business of *sale* and (2) an attempt to restrict by implication, under the guise of interpretation, a generic commodity description. Such a two-fold modification of appellant's permit is prohibited by Section 212 (a) of part II of the Interstate Commerce Act.

Not only has the Commission attempted to restrict appellant's operating authority by interpretive subtleties unknown when its predecessor's permit was granted, but it has done so in utter disregard of appellant's rights under the grandfather clause (Section 209 (a)) of part II of the Interstate Commerce Act by refusing to consider uncontroverted evidence (even as an aid to interpretation) that the grandfather carrier's operations were at least as broad as appellant's permit (unmodified by the Commission's intended use test) provides.

In addition, the procedure adopted by the Commission in restricting appellant's permit by implication is arbitrary and grossly unfair: the result was a foregone conclusion and the Commission introduced only such evidence from its files as supported its position, withheld other evidence, and refused to consider appellant's contrary evidence. The proceeding and the resulting cease and desist order violate the requirements of the Administrative Procedure Act.

ARGUMENT.

INTRODUCTION.

The defendant in a proceeding is forced to accept battle on the lines drawn by the moving party. A basic contention here is that the Commission had no authority to attempt a construction of a grandfather permit, openly stating its refusal even to consider evidence establishing the scope of the business carried on during the grandfather period and openly stating its refusal to consider the Commission's own finding of fact, still unchanged and in full force and effect, establishing what the scope of that grandfather business was. We contend that, as a matter of law, the permit must reflect the scope of that grandfather business, and that the Commission did not have then and does not have now, by any device or theory, the power to limit the carrier's authority in any way that restricts his operations to a scope narrower than that of the business carried on during the grandfather period.

But since the Commission has seen fit to cast this question to the background, and seeks to justify its action, regardless of the statutory requirements, by asserting its power to apply the so-called doctrine of intended use, we deem it advisable to meet the Commission first on the line of controversy selected by it. Therefore, we shall proceed first to a discussion of the ground upon which the Commission based its decision.

I.

APPLICATION OF THE INTENDED USE TEST IN CONSTRUING THE COMMODITY DESCRIPTION "STOCK IN TRADE OF DRUG STORES" CONSTITUTES AN ATTEMPT BY THE COMMISSION TO AMEND APPELLANT'S GRANDFATHER PERMIT, IN VIOLATION OF SECTION 212 (a) OF PART II OF THE INTERSTATE COMMERCE ACT.

A. The Commission Has No Right to Restrict the Operating Authority Granted in a Grandfather Permit by Interpreting it in the Light of a Subsequently Developed Canon of Construction.

On March 13, 1942, the Commission issued to appellant's predecessor, Andrew G. Nelson, a motor contract carrier permit to transport, *inter alia*,[17] "*stock* in trade of drug stores." (I.C.C. Ex. 7; R. 215, 232-233.)

On March 17, 1955, the Commission effectively restricted the consignees which might be served by holding that the permit authorized the transportation only of such stock in trade of drug stores as is, at the time of movement, a part of (or intended to become part of) the stock in trade of a

[17] Nelson's permit authorized transportation of "*New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores." (R. 232.) The investigation of appellant's operations was predicated upon the proposition that appellant had been hauling specified commodities not within the scope of its permit. (D.C. Ex. 1; R. 38, 46-47.) The Bureau's whole attack was directed to the commodity authorization "*stock* in trade of drug stores" and the Commission's decision is similarly limited. However, under Section 7 (c) of the Administrative Procedure Act (5 U.S.C. 1952 ed., Sec. 1006), the proponent of an order has the burden of proof, and counsel for the Bureau of Motor Carriers admitted before the hearing examiner that some of the commodities named in the Commission's order initiating the investigation could be hauled under the commodity description "*New and used store fixtures.*" (R. 53.) Therefore, while appellant's argument will be devoted primarily to attacking the Commission's interpretation of "*stock* in trade of drug stores", appellant also contends that the Commission's cease and desist order is unlawful for lack of findings, supported by proof, that none of the commodities found to have been hauled in violation of the permit could be hauled under the commodity descriptions "*New and used store fixtures*" or "*new and used household goods.*"

drug store. (D.C. Ex. 1; R. 38, 234, 240.) This was done even though it was not contested that appellant had been hauling only commodities which constitute part of a drug store's stock in trade. (Examiner's Report; R. 241-242.)

It seems obvious that an authorization to haul stock in trade of drug stores is not the same as an authorization to haul stock in trade of drug stores which at the time of movement is or is intended to become part of the stock in trade of a particular drug store. The additional restriction is arrived at through the application of the so-called intended use test. (D.C. Ex. 1; R. 38, 234, 240.)

The Commission has made the following self-serving statement (*C & H Transp. Co. Inc., Interpretation of Certificate*, 62 M.C.C. 586, 587 (1954)):

> In the issuance of motor-carrier operating authorities this Commission from the beginning of motor-carrier regulation has identified the commodities authorized to be transported in three principal ways: (a) by naming them specifically (a practice which is impractical in many instances), (b) by the use of generic or class terms, and (c) *by reference to the intended future use*. (Italics supplied.)

However, it is clear that, in the early days of motor carrier regulation, the Commission's commodity description technique was not so defined.

In *Classification of Motor Carriers of Property*, 2 M.C.C. 703, 706 (1937), the Commission established and defined 17 different groups of commodities and analysis shows that they are defined only (1) by naming them specifically, (2) by the use of generic or class terms, and (3) by the type of equipment to be operated. The first and second classification are as stated by the Commission in the *C. & H. Transp. Co.* Case, but nowhere is there any reference to the technique of describing commodities by reference to their intended future use. Cf. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 484 (1939).

Originally, the Commission was not as careful as it should have been in developing refined techniques to describe accurately the scope of operations being authorized. However, in *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475 (1939), the Commission authorized the transportation of such merchandise as is dealt in by grocery stores but added a special restriction that such commodities could be transported only for persons who operate grocery stores. This was a milestone in the development of the Commission's technique in delimiting the scope of authorized operations.[18] Still, however, there is no reference to intended use as a commodity desciption technique.

In *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M.C.C. 567 (1949), the Commission construed a certificate which authorized the transportation of:

> * * * machinery, material, supplies, and equipment *incidental to and used in* the construction, development, operation, and maintenance of facilities for the discovery, development, and production of natural gas and petroleum * * *. (Italics supplied.)

The carrier claimed that he could haul composition pipe to be used in constructing *water* pipe lines, but the Commission held that the authorized commodities (machinery, materials, supplies, and equipment) had been described by reference to their use and that they could be transported only when intended for use in the gas and petroleum industry. So far as we are aware, this is the first case in which the Commission applied what later became known as the intended use test in interpreting a permit.

It should be observed that the permit in the *England* case actually contained the language "incidental to and used in"—a special limitation on the use to which the machinery, materials, supplies, and equipment being trans-

[18] Use of a so-called *Keystone* restriction where necessary to describe accurately the scope of authorized operations was approved by this Court in *Noble* v. *United States*, 318 U.S. 88 (1943).

ported could be put. However, once the theory was announced in the *England* case, the Commission imposed such special limitations not only on permits in which it was explicit,[19] but also in cases where commodities had simply been defined, generically, by reference to the kind of business in which they are customarily used,[20] and even to a clear case of generic commodity description.[21] The pattern is a familiar one: an agency discovers a useful regulatory device and, before long, it is being applied out of context to situations never contemplated in the beginning.

The cases in note 20 all involved attempts by carriers to construe such broad terms as materials, supplies, and equipment without reference to the descriptive limitations placed on those terms in their permits. The Commission rightly concluded that to ignore the descriptive limitations would be to grant general commodity authorization, which was obviously not intended. So the Commission seized upon

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[19] *Greenberg—Investigation of Operations*, 52 M.C.C. 25 (1950), 387 (1951) ("Commodities used or useful in the manufacture of beds and brooms"); *P. B. Mutrie Motor Transp., Inc.* v. *Blue Line Exp., Inc.*, 53 M.C.C. 530 (1951) ("supplies and equipment used in the manufacture of [textile-mill] products").

[20] *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607 (1949) ("packing house and dairy * * * equipment, materials, and supplies"); *Builders' Exp., Inc., Interpretation of Certificate*, 51 M.C.C. 103 (1949) ("contractors' materials, supplies, and equipment"); *Crouch—Modification of Certificate*, 53 M.C.C. 426 (1951) ("farm supplies"); *Fleetlines, Inc.*, v. *Osbourn Trucking Co.*, 54 M.C.C. 221 (1952) ("building and construction materials, equipment, and supplies, and mining equipment and supplies"); *Dunn Extension—Radio Sets*, 54 M.C.C. 232 (1952) ("doctor's, dentist's, and hospital supplies and equipment"); *Dart Transit Co.—Investigation of Operations*, 54 M.C.C. 429 (1952), affirmed 110 F. Supp. 876 (Minn. 1953); motion to affirm granted, 345 U.S. 980 (1953) ("canning factory supplies"); *Pierce Auto Freight Lines, Inc.*, v. *Converse*, 54 M.C.C. 447 (1952) ("mining and construction materials, equipment and supplies"), affirmed, 109 F. Supp. 807, 809 (N.D. Calif. 1953), with the qualification that the court was not willing to approve the intended use test in all circumstances; *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952) ("factory supplies"), reversed on other grounds, 119 F. Supp. 277 (W.D. Wash. 1954); *Point Pleasant Transp. Co., Inc., Declaratory Order*, 61 M.C.C. 666 (1953) ("building materials"); *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586 (1954) ("contractors' equipment and supplies"); *Mural Trucking Service Interpretation of Certificate*, 63 M.C.C. 47 (1954) ("store fixtures and store equipment"; "hotel equipment").

[21] *Carroll Trucking Co. Interpretation of Certificate*, 54 M.C.C. 664 (1952) ("structural steel"), reversed on reconsideration, *Carroll Trucking Co. Interpretation of Certificate*, 62 M.C.C. 348 (1953).

the occasion to imply a special kind of limitation in the commodity description. Instead of simply restricting transportation to such supplies, materials, or equipment as are used by packing houses, contractors, etc., the Commission went further, under the guise of interpretation, and held that such supplies as are used by contractors, for example, may be transported only when definitely intended for use by a contractor. In doing so the Commission superimposed upon generic commodity descriptions special limitations upon the circumstances in which commodities falling within those generic classifications could be transported. Perhaps the Commission's success in superimposing the intended use test on such generic commodity descriptions can be attributed to the fact that the carriers involved were obviously trying to expand their authoziations beyond reasonable limits. In any event, the Commission did succeed in restricting commodity authorizations by using the intended use test as an interpretive device.

A distinction must be made between intended use as a commodity description technique and intended use as a restrictive interpretive device. We agree that the Commission has no doubt described commodities from the beginning by reference to the persons by whom or the places or businesses where they are used; but only since the *England* case in 1949 has the Commission developed the theory that, inherent in what are plainly generic commodity descriptions, is the limitation that such commodities as are used in the particular business specified can be transported only when earmarked for such use.

We believe that the intended use test, when applied as a restrictive interpretive device to permits issued before it was invented in 1949, is nothing more than a subterfuge to enable the Commission to pare down operating rights which it deems too broad under its current policies. Once a permit has been granted it can be modified only as provided in Section 212 (a) of part II of the Interstate Com-

merce Act, *supra*, p. 3—and then only for one of the reasons specified in the statute. *United States* v. *Seatrain Lines*, 329 U.S. 424, 430-431 (1947); *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, 46 M.C.C. 222 (1946); *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289 (1948). To avoid this statutory limitation on its power, the Commission frequently tries to accomplish its desires under the guise of interpretation.[22] For example, in *Bird Trucking Co.—Modification of Certificate*, 53 M.C.C. 703 (1952), the Commission interpreted the commodity description "groceries" in a grandfather certificate to mean only edibles. However, in *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,928 (W.D. Wis. Sept. 26, 1955), the district court found that the term had not been so restrictively construed when the permit was issued and remanded the case to the Commission. Similarly, in *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952), the Commission interpreted "factory supplies" in a grandfather permit to mean only commodities used in operating a factory, as distinguished from raw materials which go into the product manufactured. However, the district court found that "supplies", as it was understood when the permit was issued, embraced "materials" and that the distinction had not been made by the Commission until years afterward. *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954). On remand, the Commission agreed that the two terms had not been distinguished when the permit was issued and authorized the issuance of a revised permit covering both commodities. *Johnson Truck Service* v. *Salvino*, 63 M.C.C. 1 (1954).

In the *Bird* and *Salvino* cases, the Commission was unsuccessful in its attempts to restrict the scope of the carriers' operating authority under the guise of interpreta-

[22] On rare occasions the Commission has stated that no restriction can be implied in a permit in which it is not explicit. *Atlantic Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175, 188 (1949); *Vitas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953).

tion.[23] Thus far, it has been successful in the intended use cases; however, we believe it is time for a reappraisal of the Commission's practices in such cases. Where, as in appellant's case, the permit was issued before the intended use test was developed as a restrictive interpretive device, the Commission should not be able to avoid the mandate of Section 212 (a) and cut down the operating authority on the basis of subsequently-adopted subtleties of definition.

B. In any Event, the Intended Use Test, as a Restrictive Interpretive Device, Cannot Properly be Applied in Interpreting a Permit Where Commodities are Described not by Reference to Their Intended Use but by Reference to the Places Where They Are Sold.

Appellant believes that the Commission has confused two well established commodity description techniques and has erroneously applied the intended use test to a description of authorized commodities not by reference to their use, but by reference to places where they are sold.[24] This distinction has been made by the Commission itself. In *C & H Transp. Co., Inc., Interpretation of Certificate*, 62 M.C.C. 586, 588 (1954), the Commission gave the following examples of the kinds of commodity descriptions to which the intended use test would be applied:

(1) "Commodities used in * * *".

(2) "contractors' equipment or supplies".

And in *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607, 612 (1949), the Commission said:

> * * * it may be observed that a grant of motor-carrier authority which identifies the authorized commodity

[23] It is interesting to note that, in each case, the carrier, like appellant, claimed—and proved—that the restriction prosposed would violate his grandfather rights.

[24] Description of commodities by reference to places where they are sold is a well recognized technique. See *National Trucking Co., Inc., Ext.—Electrical Appliances*, 51 M.C.C. 638, 640 (1950); *Bird Trucking Co.—Modification of Certificate*, 53 M.C.C. 703, 706 (1952).

by reference to the intended use is generally undesirable and is resorted to only where no other form of description is practicable. Such a grant is similar in some respects but should not be confused with grants which identify the authorized commodities by reference to the places where they are dealt in as, for example, "such merchandise as is dealt in by wholesale grocery houses." Grants in this form are ordinarily made only to contract carriers and are coupled with a so-called Keystone restriction as to the type of shipper for which service may be rendered.

As shown above, the intended use test was first applied to a certificate in which commodities were explicitly described by reference to their use. Subsequently the test has been applied to such apparently generic descriptions as building materials, construction supplies, mining equipment, etc. But in each case there was a semblance of logic in the application of the intended use test because the commodities had been described by reference to the business in which they are *used;* never before has the intended use test been applied to a description of commodities by reference to places where they are *sold*, e.g. such merchandise as is dealt in by grocery stores or, as in this case, stock in trade of drug stores.

In fact, the Commission has expressly refused to imply a restriction based on ultimate destination in a certificate authorizing the transportation of "such general merchandise as is dealt in by wholesale and retail grocery stores" (*Sanders Extension of Operations—Washington, D.C.*, 47 M.C.C. 210, 211 (1947)), and a certificate authorizing the transportation of "such commodities as are sold by retail mail-order houses" (*Vidas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953)). In each case the Commission held that the quoted phrase was nothing more than a commodity description and that the commodities described could be transported for any shipper or consignee, regardless of his business. Similarly, in *Interstate Commerce*

Commission v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill., April 15, 1947), the court refused to grant the Commission's request for an injunction against the transportation of beer and empty beer containers from a brewery to a distributor where the commodities authorized in the permit were "*such merchandise* as is dealt in by wholesale food business houses, and * * * *equipment*, *materials* and *supplies* used in the conduct of such business", because it found that wholesale food business houses dealt in beer.

It is important to note that in the *Sanders*, *Vidas* and *Ratner* cases the commodities authorized to be transported were defined not by reference to their intended use, but by reference to the places where they were sold.

Once this distinction is made clear, the only question with respect to the construction of appellant's permit is whether or not the phrase "*stock* in trade of drug stores" is a commodity description by reference to intended use or merely a description of commodities by reference to the places where they are sold. As "stock in trade" is clearly merchandise sold by, and not used by, drug stores, the intended use test has no application to appellant's permit. If there is any distinction between the commodity description "such merchandise as is dealt in by", as in the *Sanders*, *Vidas* and *Ratner* cases, and "*stock* in trade of", as in appellant's permit, it is a distinction without a difference and this is clearly illustrated in *McAteer Contract Carrier Application*, 42 M.C.C. 35 (1943). McAteer was one of 189 contract carriers who hauled exclusively for the A&P Company. All of these contract carriers had applied for contract carrier permits when the Motor Carrier Act, 1935, went into effect. On February 14, 1938, the Commission issued to McAteer a compliance order directing that on complying with certain formalities it should be issued a permit authorizing the transportation of (p. 46):

> * * * such merchandise as is dealt in by wholesale, retail and chain grocer[l]y houses, and in connection

therewith equipment, materials and supplies, used in the conduct of such business.

Subsequently, but before McAteer's permit was issued, certain railroads objected to this form of compliance order, which had also been issued to many other A&P contract carriers, on the ground that those contract carriers should be restricted to hauling the commodities described in the compliance orders only for persons who operate retail stores whose chief business is the sale of food. The Commission agreed and held that the now famous *Keystone* restriction should be imposed in granting operating permits to the A&P contract carriers. *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475 (1939). The A&P carriers decided to request a rehearing before taking the issue to the courts for review, but decided that the McAteer application provided a better test case because it gave a better indication of the scope of A&P operations. Accordingly, proceedings in the *Keystone* case were suspended and McAteer requested a formal hearing if the Commission had in mind amending its 1938 compliance order to include a *Keystone* restriction. A hearing was granted on McAteer's application, but the Commission adhered to its position in the *Keystone* case and ordered the issuance of a permit which, in essence, authorized the transportation of such merchandise as is dealt in by grocery stores only for persons who operate grocery stores.

The *McAteer* case is particularly significant because the Commission found that McAteer had been transporting (1) "the *stock in trade* of A&P stores" and (2) miscellaneous store and plant supplies and equipment. 42 M.C.C. 35, 45-46 (Italics supplied). The Commission held that a permit authorizing the transportation of "such merchandise as is dealt in by * * * grocery and food business houses, and, in connection therewith, equipment, materials, and supplies used in the conduct of such business" permitted the transportation of any commodities which McAteer had

transported in the past and every commodity of like class which might be offered him. *Id.*, at 46-47. Clearly, the Commission was equating "stock in trade of" with "such merchandise as is dealt in by".[25]

It is also significant that in the *Keystone* case itself, the Commission justified the imposition of the *Keystone* restriction on the theory that there was no other way accurately and closely to define the business of the A&P contract carriers except by reference to the class of shippers served and that the only alternative to the imposition of a Keystone restriction was simply to authorize the transportation of such merchandise as is dealt in by wholesale, retail and chain groceries, which would be tantamount to general commodity authorization. 19 M.C.C. 475, 494 (1939). Chairman Eastman put it this way in his concurring opinion (p. 500):

> Under such a permit the holder could lawfully enter into a contract or contracts with any person for the transportation of the commodity, commodities, or class of commodities specifically named in the permit or embraced in the general commodity description thereof. To make the situation still plainer, if a contract carrier were authorized to transport such merchandise as is dealt in by a large mercantile concern or by a wholesale or a retail chain grocery business, it could enter into a contract or contracts with any shipper or concern to transport any one or all of the commodities coming within such commodity description and moving within the territorial limitations of its permit.
>
> When it is considered how extensive the list of commodities is which comes "within such commodity description," it becomes evident that such a permit would for practical purposes be equivalent to a grant of authority to transport as a contract carrier commodities in general within the specified territory.

[25] It is significant that the Commission which decided the *McAteer* case was composed of the same personnel as that which granted Nelson's permit.

The *Keystone* and *McAteer* cases make it clear that, where commodities are described by reference to the places where they are sold, the only appropriate limitation is a *Keystone* restriction. See also *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607, 612 (1949).

It may be that the Commission now feels that it erred in issuing to Nelson a permit which authorized the transportation of "*stock* in trade of drug stores" without a *Keystone* restriction.[26] However, it is well established that no such restriction can be implied in a permit in which it is not explicit.[27] *Vidas Contract Carrier Application*, 62 M.C.C. 106, 107 (1953). Cf *Chrispens Truck Lines, Inc.—Investigation of Operations*, 63 M.C.C. 625 (1955).

["*S*]*tock* in trade of drug stores," is equivalent to "such merchandise as is dealt in by drug stores" and is nothing more than a description of commodities authorized by reference to places where they are sold. This was, in effect, conceded by the hearing examiner. (R. 243.) In addition, in the 1938 compliance order, which was part of the evidence underlying the issuance of the grandfather permit which the Commission refused to consider (R. 237), the Commission found that Nelson had been transporting "commodities

[26] It should be noted that the commodity description "*stock* in trade of drug stores" in Nelson's 1942 permit was taken directly from the Commission's compliance order, issued February 14, 1938, the same date on which McAteer's compliance order authorizing the transportation of "such merchandise as is dealt in by wholesale, retail, and chain grocer[1][y food business houses," was issued. As indicated above, the Commission found it necessary, after adoption of the *Keystone* restriction in 1939, to amend McAteer's compliance order in order to add a *Keystone* restriction. It may be that, had the Commission thought about it, it would likewise have tried to add a *Keystone* restriction to Nelson's commodity authorization. However, as we will demonstrate in Point II of the argument, the imposition of a *Keystone* restriction on Nelson's operating authority would have been unwarranted in view of the nature of his grandfather operations and of his rights under the grandfather clause.

[27] A *Keystone* restriction limits the class of shippers which may be served. The restriction imposed by application of the intended use test is correlative in that it limits, for all practical purposes, the consignees which may be served to users of the commodities in the manner specified or conduits to such users. If a *Keystone* restriction can not be implied in a permit, neither can an intended use restriction.

indicated" as, *inter alia*, "*stock* in trade of drug stores" (I.C.C. Ex. 5; R. 215, 230). The examiner conceded that the issue before him would have been entirely different if the permit had read "commodities described as stock in trade of drug stores." (R. 242-243.) We fail to see any difference between "commodities indicated," as in the compliance order and "commodities described as," as in the examiner's report.

Under the Commission's own decisions, a commodity description by reference to place of sale must be distinguished from a description of commodities by reference to their use. Clearly, the Commission has misapplied the intended use test to the commodity description "*stock* in trade of drug stores." The Commission has attempted (1) to change the nature of the commodity description in appellant's permit from a description of commodities authorized by reference to places where they are sold to a description by reference to places where they are used and (2) to require that the commodities so described be earmarked for such use at the time of transportation by applying a restrictive interpretive device (the intended use test) developed after the permit was issued. Such a two-fold modification of appellant's permit cannot be made, under the guise of interpretation, to implement the Commission's current policies, in violation of Section 212 (a)[28] of part II of the Interstate Commerce Act, *supra*, p. 3.

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[28] The Commission, early in its administration of the Motor Carrier Act, 1935, developed hostility toward contract carriers—particularly those with grandfather rights. See, for example, the concurring opinion of Chairman Eastman and the dissenting opinion of Commissioner Lee in *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475, 496, 500 (1939). Contract carriers possessed greater flexibility of operations than common carriers, whom the Commission felt obligated to protect; and the operations of carriers with grandfather rights could not be moulded to suit the Commission's concept of its regulatory function. As a result, the Commission, over the years, launched a subtle, but effective, attack on carriers with grandfather rights which has been skillfully described by District Judge (now Court of Appeals Judge) Fee in his concurring opinion in *Johnson* v. *United States*, 41 F. Supp. 188, 190 (Oregon 1941). Among other things, Judge Fee deplores (p. 190):

> * * * the patent injustice of using a test which at the time of the event had not been called to the attention of the carrier by express terms of the statute nor foreshadowed by the decisions of the Commission itself * * *.

United States v. *Seatrain Lines*, 329 U.S. 424 (1947); *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par. 81,028 (W.D. Wis. Sept. 26, 1955); *Salvino* v. *United States*, 119 F. Supp. 277 (W.D. Wash. 1954); *Campbell Sixty-Six Exp., Inc.* v. *Frisco Transp. Co.*, 46 M.C.C. 222 (1946); *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289 (1948).

II.

THE COMMISSION ERRED IN REFUSING TO CONSIDER EVIDENCE OF NELSON'S GRANDFATHER OPERATIONS.

A. If the commodity description "stock in trade of drug stores" in appellant's permit is ambiguous, the Commission should have considered evidence of Nelson's grandfather operations as an aid to interpreting what was intended by that language.

We agree with the Commission that the ultimate question in this case is what transportation was intended to be authorized by the language "*stock* in trade of drug stores" (together with the other commodity descriptions) in appellant's permit (R. 238.) Congress intended, in Section 209 (a) of the Interstate Commerce Act, Part II, *supra*, p. 2, to guaranty to grandfather carriers substantial parity between the transportation conducted prior to motor carrier regulation and the transportation authorized in certificates and permits issued to them by the Commission under the Motor Carrier Act, 1935. *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942). Because of this statutory mandate, the Commission has frequently found it helpful to examine underlying grandfather operations in interpreting what was intended by the language of a grandfather permit. *Balt. & A. R. Co.* v. *Red Star Motor Coaches, Inc.*, 44 M.C.C. 243, 245 (1944). However, the Commission has developed a rule that underlying grandfather operations will be exam-

ined only where the language of the permit to be interpreted is ambiguous.[29] See, e.g., *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co. Inc.*, 48 M.C.C. 289, 299-301 (1948); *P. Saldutti & Son, Inc., Interpretation of Permit*, 63 M.C.C. 593, 594 (1955). In this case, the Commission held that the phrase "*stock* in trade of drug stores" in appellant's permit was not ambiguous and, therefore, refused to consider evidence of Nelson's grandfather operations. (R. 237.)

Appellant has consistently maintained that the phrase "*stock* in trade of drug stores" in its permit is not ambiguous; nevertheless, appellant was forced to introduce evidence concerning Nelson's grandfather operations because of the position initially taken by the Bureau of Motor Carriers that the permit was ambiguous and that evidence of Nelson's grandfather operations proved that appellant was conducting unauthorized operations.[30] (R. 50-52, 114-116.)

If there is any ambiguity in appellant's commodity authorization, it is created solely because of the Commission's insistence that the phrase "*stock* in trade of drug stores" must be interpreted as embodying, by implication, the intended use test. In *Johnson Truck Service* v. *Salvino*, 61 M.C.C. 329 (1952), the Commission refused to consider evidence of underlying grandfather operations and insisted

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[29] The decision as to whether or not there is an ambiguity seems to depend on whether the grandfather evidence supports the Commission's position. In the following cases the Commission supported its decisions by showing that the commodities whose transportation the carrier claimed was authorized had not been transported during the grandfather period: *Builders Exp., Inc., Interpretation of Certificate*, 51 M.C.C. 103 (1949); *Black* v. *Interstate Commerce Commission*, 165 F. 2d 825 (C.A. 5 1948); *Dart Transit Co.—Modification of Permit*, 49 M.C.C. 607 (1949); *Dart Transit Co.—Investigation of Operations*, 54 M.C.C. 429 (1952); *Pomprowitz Extension—Packing House Products*, 51 M.C.C. 343 (1950); *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391 (1951).

[30] Fortunately, appellant was able to produce Andrew G. Nelson, the grandfather carrier, to testify as to the nature of his operations. Obviously, it places a great burden on holders of grandfather permits to have to produce evidence of events taking place more than 20 years ago in order to combat the Commission's persistent efforts to nibble away at their operating rights under the guise of interpretation.

upon interpreting the carrier's permit according to refinements in commodity description unknown at the time the permit was issued. This grossly unfair approach was denounced in *Salvino* v. *United States*, 119 F. Supp. 277 (W. D. Wash. 1954), and the case was remanded to the Commission. On remand, the Commission reexamined the carrier's grandfather operations and found that the language in the grandfather permit was intended to authorize operations broader than the Commission's subsequent interpretation would have permitted. Similarly, in *Bird Trucking Co.—Modification of Certificate*, 53 M.C.C. 703 (1952), the Commission refused to give adequate consideration to the underlying grandfather operations and interpreted the commodity authorization in the light of a subsequent refinement in its descriptive technique. The case was remanded to the Commission for consideration of the evidence of the underlying grandfather operations. *Bird Trucking Co.* v. *United States*, 11 Federal Carriers Cases, par 81, 028 (W.D. Wis. Sept. 26, 1955).

Since the position of the Bureau of Motor Carriers that the intended use test should be read into the commodity description "*stock* in trade of drug stores" created an ambiguity, the Commission should have examined Nelson's grandfather operations in order to resolve that ambiguity. Indeed, the Commission itself has stated, in *Bison Freight Lines* v. *Northwest Dispatch Inc.*, 60 M.C.C. 505, 506 (1954):

> Our attention has not been directed to any proceeding in which the Commission has refused to make an examination of antecedent matters and has held that an operation complained of was not authorized, where it was contended that such examination, if made, would disclose the intent of the framers of the certificate to authorize the operation.

Andrew G. Nelson's testimony clearly shows that, during the grandfather period, he was in the business of haul-

ing anything, anywhere, for anybody, for any price, and that the nature of the commodities transported was even broader in scope than the commodities allegedly hauled in violation of the terms of appellant's permit. (Appendix A, *infra*, p. 48; R. 84, 96-98.)

The Commission's practice of considering grandfather evidence only where it supports its interpretation is nowhere better illustrated than in this case. At first, the Bureau of Motor Carriers maintained that appellant's permit was ambiguous—obviously because it was armed with documentary evidence from the record in the grandfather proceedings which indicated that Nelson had transported merchandise only for Walgreen Drug Stores. (I.C.C. Ex. 1; R. 53, 215-226.) This, of course, would have tended to support its position that stock in trade of drug stores was authorized to be transported only when intended to become part of the stock in trade of a drug store. However, after the hearing, during which appellant had introduced evidence that Nelson was hauling a variety of commodities not only for Walgreen, but also for manufacturers, jobbers, etc. (Appendix A, *infra*, p. 48), the Bureau switched its position and maintained that the permit was unambiguous in an effort to preclude consideration of the evidence underlying the issuance of the grandfather permit, and the Commission adopted the Bureau's position (R. 237, 242).

While appellant believes that its permit is not ambiguous, the contention of the Bureau of Motor Carriers that it should be interpreted as embodying a special limitation which had never been used in connection with a description of authorized commodities by reference to places where they are dealt in or sold, has made it ambiguous. Accordingly, the Commission should have considered evidence of Nelson's grandfather operations in determining whether or not the Bureau's contention was valid.

B. If the commodity description "stock in trade of drug stores" in appellant's permit is not ambiguous and if the Commission properly interpreted that description by applying the intended use test, the Commission should have altered the permit to accord the substantial parity between Nelson's grandfather operations and the authorized operations that is guarantied by the grandfather clause of the Interstate Commerce Act, Part II.

It is clear that a permit issued under the grandfather clause (Section 209 (a)) of part II of the Interstate Commerce Act, *supra*, p. 2, must authorize operations at least as broad as the underlying grandfather operations. *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942). It is also clear that, where a permit does not conform to this requirement, the Commission may reopen the grandfather proceeding in which it was granted and may—indeed must—alter or modify the permit accordingly. *Grifall Common Carrier Application*, 62 M.C.C. 763 (1954); *Johnson Truck Service* v. *Salvino*, 63 M.C.C. 1 (1954).

Therefore, appellant contends that, if the commodity description "*stock* in trade of drug stores" is not ambiguous and if the intended use test has been properly applied in construing that commodity description, the language of the permit fails to grant substantial parity between the authorized operations and Nelson's grandfather operations and the Commission should have altered the permit accordingly. The nature of Nelson's grandfather operations, which the permit should have reflected, was as follows:

Andrew G. Nelson started his trucking business in 1919. (R. 77.) From that time until the middle of 1935, he was in the business of hauling anything, anywhere, for anybody, for any price.[31] (Appendix A, infra, p. 48; R. 84, 96-98.)

[31] On August 24, 1934 Nelson was granted a Certificate of Registration under the code of fair competition for the trucking industry in which he was described as an "*ANYWHERE FOR HIRE Member of the Trucking Industry*". (I.C.C. Ex. 4; R. 215, 229.) Such registration in and of itself is evidence of *bona fide* operation to be considered in connection with the issuance of a grandfather permit. Interstate Commerce Act, Part II, Sec. 209 (a), *supra*, p. 2.

To be sure, many of his earlier customers went out of business during the depression, but that did not change the character of his holding out or of his actual operations. (Appendix A; R. 75, 79, 80, 148-152.) And it is well established that in determining the scope of a carrier's grandfather rights the important criterion is not the precise operations in which he was engaged on the grandfather date (July 1, 1935), but the general nature of his holding out, accompanied by operations consistent therewith. *Charles Burnett Trucking Co., Inc., Com. Car. Application*, 34 M.C.C. 467 (1942); *Johnson Truck Service v. Salvino*, 63 M.C.C. 1, 5 (1954). In *United States v. Carolina Carriers Corp.*, 315 U.S. 475 (1942), the Commission had attempted to issue a grandfather certificate limiting the carrier to the transportation of the specific commodities actually transported during the grandfather period. However, this Court held that, if the carrier had transported a wide variety of general commodities, the Commission had no right to deny it the right to carry others of the same class merely because they had not been transported previously and that it had no right to restrict the carrier to the transportation of those commodities which had been carried with more frequency and in greater quantities than other commodities. This Court refused to allow the Commission to atomize the carrier's prior service, product by product, so as to restrict the scope of his operations where there was substantial evidence that he was in bona fide operation as a carrier of a large group of commodities or of a whole class of property.[32] *Id.* at 483-484.

When the broad nature of Nelson's holding out and the wide variety of commodities actually transported are considered, there is considerable doubt as to whether or not the permit issued to him grants all the rights to which he

[32] This interpretation squares with the legislative history of the grandfather clause. In explaining the Senate's amendments to Section 209, Senator Wheeler stated (79 Cong. Rec., Pt. 5, p. 5654):

> This section has been changed * * * to make clear that the bill applies to the business of contract carriers and not merely to particular operations under the individual contracts.

is entitled under the grandfather clause even without the Commission's restrictive interpretation through the application of the intended use test. Under the commodity description "*stock* in trade of drug stores", as appellant interprets it, only such commodities as are customarily held for sale to customers by drug stores may be transported; whereas a perusal of the commodities transported during the grandfather period indicates that Nelson was actually hauling a broader range of commodities, e.g., dime store merchandise, slate, flagstone, marble, plumbing and heating supplies and fixtures, electrical equipment, and automobile bodies and transmissions. (Appendix A, *Infra*, p. 48.) In fact, there is some question as to whether or not the Commission intended to restrict Nelson to the transportation of stock in trade of drug stores.

Nelson had applied for a permit to transport "store fixtures, *miscellaneous merchandise* and household furniture." (D.C. Ex. 2; R. 38, 248. Italics supplied.) In connection with the application, Nelson submitted delivery tickets which described the commodities transported, generally, as miscellaneous store fixtures, *merchandise*, and household furniture, and a schedule of minimum rates or charges in which he quoted rates for store fixtures, *miscellaneous merchandise*, household goods and furniture. (D.C. Ex. 2; R. 38, 269-270, 273.) As was usual in processing grandfather applications, no hearing was held, but the application was handled through the Commission's field investigators. (R. 244.) *Neuendorf Transportation Co. v. United States*, 145 F. Supp. 672 (E. D. Wis. 1956). In 1938, the Commission issued its compliance order reciting that Nelson had applied for a permit according to the specification set forth on the reverse side and had been in operation in that manner, and ordering that a permit should be issued

in accordance with that specification. (I.C.C. Ex. 5; R. 215, 230.) However, the specification on the reverse side which was referred to in order to identify (1) the operating authority requested in the application, (2) the scope of Nelson's prior grandfather operations, and (3) the operating authority to be granted in the permit, reads as follows (R. 231):

> *New and used store fixtures, new and used household goods,* and *stock* in trade of drug stores.

Nowhere in the documents that were before the Commission when the compliance order was issued was there any reference to stock in trade of drug stores. Therefore, either the compliance order was in error when it recited that Nelson had applied for a permit according to the specification on the reverse side and that he had been operating in that manner or the specification erroneously read "*new and used store fixtures, new and used household goods,* and *stock* in trade of drug stores" instead of "store fixtures, miscellaneous merchandise, and household furniture" (the language used in the application and in the documents submitted in support of the application).

Unless appellant is permitted to transport such merchandise as is dealt in by drug stores, regardless of the consignor, consignee, or ultimate destination of those commodities, appellant contends that its permit does not accord the substantial parity of operations guaranteed by the grandfather clause of the Interstate Commerce Act, Part II, and that on the basis of the evidence of Nelson's grandfather operations the Commission should have altered the permit accordingly.

III.

THE COMMISSION'S REPORT AND ORDER VIOLATE THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

A. The Commission's report lacks findings and conclusions with respect to all material issues of fact and law, with reasons and bases therefor, as required by Section 8 (b) of the Administrative Procedure Act.

It is apparent that evidence as to the scope of Nelson's grandfather operations is of great importance in this case either as an aid to interpretation or as an indication of whether or not appellant's permit conforms to the requirements of the grandfather clause of part II of the Interstate Commerce Act. Actually, most of the documents and testimony submitted at the hearing by both parties concerns the subject of Nelson's grandfather operations. Nevertheless, the Commission ignored all evidence of the events underlying the issuance of Nelson's permit in determining whether or not appellant was transporting commodities not authorized by its permit. (R. 237.)

Section 8 (b) of the Administrative Procedure Act, *supra*, p. 3, requires that, in a case of this nature, the decision include a statement of findings and conclusions, as well as the reasons or bases therefor, upon all material issues of fact, law, or discretion presented on the record. *Howard Hall Co. v. United States*, 315 U.S. 495 (1942). In view of the importance in the case of findings and conclusions as to the scope of Nelson's grandfather operations, the Commission's refusal to make those findings and conclusions violates the requirements of Section 8 (b) and its decision should not be sustained.

B. The Commission's cease and desist order is arbitrary and capricious, represents an abuse of discretion, exceeds its statutory limitations, denies appellant its statutory rights and is unsupported by substantial evidence, in violation of Section 10 (e) of the Administrative Procedure Act.

Section 10 (e) of the Administrative Procedure Act, *supra*, p. 4, defines the scope of judicial review of administrative decisions, and provides that the reviewing court shall hold unlawful and set aside any agency's action found to be arbitrary, capricious, or an abuse of discretion, in excess of its statutory limitations, or short of statutory right, or unsupported by substantial evidence.

The Commission's cease and desist order is arbitrary and capricious. This is well illustrated by the procedure followed. The investigation into appellant's operations was initiated by an order which, in effect, recited that appellant had been hauling certain enumerated commodities outside the scope of its permit and then ordered a hearing to determine whether or not appellant had been hauling commodities outside the scope of its permit. (D. C. Ex. 1; R. 38, 46.) Obviously, such an order presaged a foregone conclusion that appellant had violated the terms of its permit and indicated that the hearing would be a mere formality. If the Commission had been convinced (as apparently it was) that appellant had transported unauthorized commodities, the most direct approach would have been to apply to the district court for an injunction under Section 222 (b) of part II of the Interstate Commerce Act (49 U.S.C. 1952 ed., Sec. 322 (b)). Instead, the Commission chose to initiate an investigation under Section 204 (c) of the Act (49 U.S.C. 1952 ed., Sec. 304 (c))—a proceeding which would appear to be appropriate only where the

Commission was seeking facts and not where it already had sufficient details concerning the alleged violations to draw what amounts to a bill of particulars. No doubt the Commission chose this method of attacking appellant's operations because it had been denied an injunction in an almost identical situation by the same district court to which it would have had to apply for an injunction against appellant.[33] By choosing to bring the case before its own administrative tribunal, the Commission was able to approach the reviewing court with a presumption of the correctness of its own interpretation of appellant's permit. *Converse* v. *United States*, 109 F. Supp. 807 (N. D. Calif. 1953); *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876 (Minn. 1953), motion to affirm granted, 345 U.S. 980 (1953).

The Commission's cease and desist order represents an abuse of discretion, exceeds its statutory limitations, and denies appellant its statutory rights. The Commission restricted appellant's operating rights, guarantied by Congress in the grandfather clause of the Interstate Commerce Act, Part II, by construing its permit in the light of an interpretive device never intended to be applied to a commodity description such as that contained in appellant's permit. See Point I of the Argument.

The Commission's cease and desist order is not supported by substantial evidence. If the commodities alleged to have been hauled in violation of appellant's permit are of the same kind as were hauled during the grandfather period, appellant has a right to transport them now, regardless of what the Commission now construes the language of its permit to mean. *Bison Freight Lines* v. *Northwest Dispatch Inc.*, 60 M.C.C. 505 (1954). However, the Bureau

[33] In *Interstate Commerce Commission* v. *Ratner*, 6 Federal Carriers Cases, par. 80,415 (N.D. Ill. April 15, 1947), the court held that a commodity description "such *merchandise* as is dealt in by wholesale food business houses, and * * * *equipment, materials*, and *supplies* used in the conduct of such business" authorized the transportation of beer and empty beer containers from a brewery to a distributor inasmuch as wholesale food business houses did deal in and distribute beer.

offered no evidence that the commodities allegedly hauled in violation of the permit had not been hauled during the grandfather period, and appellant did offer evidence to the contrary. (Appendix A, *infra*, p. 48.) Therefore, the Commission's finding that appellant has transported commodities without the scope of its permit is not supported by substantial evidence. (R. 240, 246.)

CONCLUSION.

Appelant is fully aware of the rule that administrative decisions should not be disturbed unless arbitrary, capricious and clearly erroneous. Nevertheless, there are limits to the power of an agency such as the Interstate Commerce Commission, and it is the function of the courts to see to it that such agencies have not exceeded their statutory powers and have observed the rudiments of fair play.

In this case, we believe it is clear that the Commission has unjustifiably restricted the operating authority of a grandfather contract carrier permit (1) by misapplying an insidious interpretive device; (2) by implying a restriction on a generic commodity authorization which was unknown when the permit was granted; (3) by ignoring appellant's rights under the grandfather clause of part II of the Interstate Commerce Act; and (4) by violating the procedural requirements of the Administrative Procedure Act.

The Commission's cease and desist order should be held unlawful and set aside.

Respectfully submitted,

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September, 1957

APPENDIX A.

SUMMARY OF ANDREW G. NELSON'S TESTIMONY REGARDING COMMODITIES HAULED DURING GRANDFATHER PERIOD AND COMPARISON WITH COMMODITIES HAULED BY APPELLANT (ALLEGEDLY IN VIOLATION OF ITS PERMIT) BETWEEN JULY 31 AND DECEMBER 7, 1953.

Commodities transported July 31 - Dec. 7, 1953	Comparable commodities transported on and before July 1, 1935	Consignor	Record Reference
groceries (generally): canned or packaged grocery items; dry cream, milk and malted milk; liquid cream; fruit juices; candy	groceries (generally):		
	sugar	Godchaux Sugar Co.	81, 149
		Packer Sugar Co.	83, 152
		Franklin Sugar Co.	83, 152
	salt	Myles Salt Co.	83-84, 152
	chili products *	Gebhard Chili Co.	83, 151
	brandied fruits	Renault, Inc. (manufacturer)	83, 151
beer and wines	malt drinks	Goetz Brewing Co.	81, 150
	wines and liquors *	Judge & Dolph (distributor)	84, 152
dry glue	fertilizer	Armour Fertilizer Co.	81, 150
automobile batteries	electrical equipment *	Loyal Electric Co. (manufacturer)	79, 148
	steel bodies, transmissions *	Hendrickson Motor Truck Co. (manufacturer)	80
Fibreboard boxes	paper products *	Freeman Paper Co.	81, 149 - 150
	paper	Peerless (Seiberling?) Paper Co.	84, 152
	wiping rags	Robinson Waste Co.	81, 150
kitchen, storage or wardrobe cabinets or lockers	new furniture *	Grand Rapids Furniture Co. (dealer)	79-80
	new and used furniture *	Gordon Furniture Co. (dealer)	80
	furniture	M. J. Sanborn Co. (dealer)	80, 149
	furniture, etc.*	L. Pine (K. Klein?) & Co.	84, 152
	safes & steel cabinets	Mosler Safe Co.	81, 150
	safes	Busse Safe Co. (manufacturer)	83, 151
drugs and medicines	toiletries *	Melba Mfg. Co.; Schulte Bros.	78
		Federated Drug Co. (broker)	80, 149
		Buy Right Drug Co.	80, 149
	toiletries & chemicals *	A. C. Drury Co.	80, 149
	witch hazel	A. E. Childs & Co. (manufacturer)	83, 151

beer and wines	malt drinks	Goetz Brewing Co.	81, 150
	wines and liquors *	Judge & Dolph (distributor)	84, 152
dry glue	fertilizer	Armour Fertilizer Co.	81, 150
automobile batteries	electrical equipment *	Loyal Electric Co. (manufacturer)	79, 148
	steel bodies, transmissions *	Hendrickson Motor Truck Co. (manufacturer)	80
Fibreboard boxes	paper products *	Freeman Paper Co.	81, 149 - 150
	paper	Peerless (Seiberling?) Paper Co.	84, 152
	wiping rags	Robinson Waste Co.	81, 150
kitchen, storage or wardrobe cabinets or lockers	new furniture *	Grand Rapids Furniture Co. (dealer)	79-80
	new and used furniture *	Gordon Furniture Co. (dealer)	80
	furniture	M. J. Sanborn Co. (dealer)	80, 149
	furniture, etc.*	L. Pine (K. Klein?) & Co.	84, 152
	safes & steel cabinets	Mosler Safe Co.	81, 150
	safes	Busse Safe Co. (manufacturer)	83, 151
drugs and medicines	toiletries *	Melba Mfg. Co.; Schulte Bros.	78
		Federated Drug Co. (broker)	80, 149
		Buy Right Drug Co.	80, 149
	toiletries & chemicals *	A. C. Drury Co.	80, 149
	witch hazel	A. E. Childs & Co. (manufacturer)	83, 151
	zinc oxide	Phillips Bros. (manufacturer)	83, 151
	drug store merchandise *	Walgreen Co.	78, 92-93
no comparable commodities	drug store merchandise (other than drugs and medicines) *	Walgreen Co.	78, 92-93
	dime store merchandise *	Neisner Bros.	78 - 79
	marble	Martin's Marble Co.	79
		Anderson Marble Co.	79
		Peerling Marble Co.	79
		Acme Marble Co.	79
		Henry Marble Co.	79
	slate, flagstone, etc.*	Davis Slate Mfg. Co.	79, 148
	sewers, bricks	Stone Brick Co.	81, 150
	plumbing & heating supplies & fixtures *	Long Plumbing & Heating Co.	83, 151
	freight	Goodrich-Westport Steamship Co.	80, 82 - 83

* Indicates commodities being transported for customer during 1935. Nelson lost some of his customers in the early 1930's because of the depression (R. 79, 80, 148-152) and his testimony, based on memory (R. 77, 158), is not as clear as might be desired as to when he ceased hauling for certain customers. However, he did testify that he was hauling for all customers mentioned during 1935 unless otherwise specified. (R. 77, 82, 84.)